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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD DEAN LAMPHERE, Defendant and Appellant.	A152773 (Solano County Super. Ct. No. FCR287577)

In 2006, Richard Ahlquist won a contest sponsored by a magazine and as a result was introduced to various "celebrity mentors," one of whom was defendant Richard Lamphere, a real estate developer. Ahlquist eventually gave Lamphere $300,000 to invest in a project to develop a property owned by Lamphere in Oroville into a self-storage facility. A few months later, unbeknownst to Ahlquist, Ronald Nicoli also invested approximately $1.3 million in that same project. Lamphere quickly spent Ahlquist's money on various personal expenses, including his wife's credit card bills. Meanwhile, in response to Ahlquist's inquiries over the next two years, Lamphere continued to represent that the project was moving forward. Eventually, Ahlquist asked for his money back and hired an attorney, at which point he learned that the Oroville property had long since been sold. He never recovered any of his investment.

Lamphere was charged with five counts: grand theft by false pretense of Nicoli's investment, grand theft by embezzlement of Ahlquist's investment, sale of unregistered

securities, offering of a security for sale using false statements or omission of a material fact, and sale of a security by willful and fraudulent use of a device, scheme, or artifice to defraud, with the further allegation with respect to each count that the value of the property taken exceeded $200,000. In August of 2016, a jury convicted Lamphere of each count except the first, on which it was unable to reach a verdict, and found the $200,000 enhancement allegation true. Lamphere argues that the trial court erred in permitting the prosecution to amend certain dates in the information at trial, that certain of the jury instructions were erroneous, that substantial evidence does not support the verdict on count 3, that the prosecutor committed prejudicial misconduct in closing argument, and that the enhancement for taking property valued in excess of $200,000 must be set aside. We reject the arguments and affirm the judgment.

FACTUAL BACKGROUND[1]

In 2006, Richard Ahlquist was a 50-year-old airline pilot living in Woodbury, Minnesota. He had a subscription to Kiplinger's personal finance magazine, and he entered, and won, a "Win Your Dream Job" contest sponsored by Kiplinger's by submitting an essay and a videotape describing a new business he wanted to develop. After winning the contest, Ahlquist was to be introduced to various "celebrity mentors," and the woman who started the contest eventually suggested that Ahlquist meet with a real estate developer named Richard Lamphere, the defendant.

Ahlquist first met with Lamphere in August of 2006 in Sacramento. They discussed "numerous things, family, kids, but most of all real estate development." Lamphere told Ahlquist that he was a successful real estate developer, and according to Ahlquist, Lamphere "lived a lifestyle of a very successful real estate developer."

[1] The facts in this section are drawn from the trial testimony of Ahlquist and Nicoli. Certain other evidence at trial will be discussed in connection with the various issues on appeal.

Ahlquist told Lamphere he wanted to have savings for his retirement in the form of real estate.

The next day, Ahlquist had a meeting with a financial planner, set up as part of his contest prize. Lamphere unexpectedly showed up after the meeting and discussed real estate with the financial planner. Ahlquist was "very much in awe of Mr. Lamphere's vision" and "his ability to think of raw land turning into something more than just raw land."

Ahlquist and Lamphere met again in September, and again discussed investments and profits in the real estate business. And the next day, Ahlquist attended a "mastermind meeting" with Lamphere, the financial planner, and various other businesspeople so that Ahlquist could learn some business principles. Ahlquist later described the meeting as "several businessmen sitting around talking about business problems, and most of them tended to look towards Mr. Lamphere as the solution to their problems."

On October 18, Ahlquist met with Lamphere at an "inner circle real estate seminar" in Sacramento, at which several real estate presentations were given. Several people at the meeting knew Lamphere, which gave Ahlquist the impression that Lamphere was "well known and successful."

Over several phone conversations in late October, Lamphere told Ahlquist he had a project that would "be perfect for [Ahlquist] to invest in": Lamphere had acquired a golf course in Oroville that he proposed to develop into a self-storage facility, to be called Pacific Heights Self-Storage. Lamphere suggested that the project would be a "cash cow" because of the monthly income it would generate. Ahlquist understood that he would be a passive investor, and Lamphere the manager and developer. Ahlquist decided to invest $300,000 of his retirement funds in the project.

Within a week or two of these phone conversations, Ahlquist received a prospectus regarding the project. The prospectus indicated that the Oroville property

would be held in the name of an LLC, in which Ahlquist would receive a 16.5% interest in exchange for his $300,000 investment. Ahlquist believed, based on the prospectus, that his money would be held in a capital account. The prospectus also stated: "The local municipality is being very cooperative and supportive of the project and should grant final approval within six months. This time frame works perfectly and will allow for fixed design and approval in April 2007 and groundbreaking in late spring, after the wet weather has passed."

On November 17, Ahlquist wired the $300,000 to West America Bank in Vacaville, California, to an account in the name of Lamphere Development.

Ahlquist subsequently received an operating agreement and an amendment to the operating agreement, which reflected the fact that he had contributed $300,000 and received a 16.5% membership interest in Pacific Heights Self-Storage, LLC. The remaining 83.5% of the LLC was held by Lamphere Development, Inc., which had made a capital contribution consisting of the Oroville property. The amendment also indicated that Ahlquist's $300,000 would be held in a capital account.

On January 30, 2007, Lamphere met with Ronald Nicoli and a mutual acquaintance to discuss Nicoli's potential investment in the Oroville project. At the meeting, Lamphere gave Nicoli a document describing the project and went over it with him. Lamphere described the project as developing a "storage facility, an RV storage, save out four acres for a mini mart, gas station, maybe even a hotel in the future." The document indicated that Lamphere was seeking "one or two equity partners who will contribute a total of $1.3 million to the project for 54 percent ownership," and described a total project cost of approximately $7.2 million and a monthly net income from the project of $62,769. This income stream was very important to Nicoli as he intended to invest his life savings in the project. Lamphere told Nicoli that the project would take three years to build, but Nicoli responded that it needed to be done "in a year, year-and-a-half maximum." Lamphere was willing to do that. Lamphere also told Nicoli that he had

purchased the property with approximately $900,000 of debt on it and that Nicoli's money would be used to pay off that debt before seeking a construction loan. The debt was owed to Rickie Robinson, from whom Lamphere had purchased the property in 2006. Lamphere did not mention Ahlquist or his investment in the project. In approximately April of 2007, Nicoli invested $1.289 million in exchange for a 53.56 percent interest in the Oroville property.

Meanwhile, beginning in January 2007, Ahlquist emailed and spoke to Lamphere at various times seeking updates on the project. In January, Ahlquist emailed wondering "while the money is sitting there awaiting other investors and groundbreaking in the spring, if perhaps there is any kind of return on the money." On April 3, Ahlquist wrote Lamphere that he "would like to come out for a visit as soon as you break ground. I also wanted to visit when you might have some time for me, you know, hang around with my hero." Lamphere replied on April 17, that "all is well," that he had met with an architect who had a "killer layout" for the project, and that "[w]e should be ready to submit for approval the first week in May."

In July, Ahlquist wrote again, seeking an update on the project: "I'd love to get out there. Any plans to break ground soon? If you get a chance, would you give me an update, a call." Ahlquist did not remember Lamphere's response, although he was satisfied with it.

In October, Ahlquist wrote to Lamphere asking for a schedule K-1 regarding his interest in the project to file with his taxes. Lamphere sent him one, which reflected his 16.5% interest in the project. The document also listed a "beginning capital account" as well as an "ending capital account" amount of $300,000, which Ahlquist took to mean that his "$300,000 was still there."

In May of 2008, Lamphere wrote to Ahlquist: "Hi, Rich, we have a lot going on with the property and have had some unsolicited interest from some people who may want to buy the project. We could make a 25 percent return and then roll the money into

another project. The property is in the process of being annexed into the city limits, so the value is going up. Also, Caltrans is in the process of improving the intersection and installing signal lights, which is a huge improvement. If we don't sell, we will break ground by the end of the summer. Hope all is well. Talk with you soon. Rich Lamphere."

Ahlquist and Lamphere exchanged emails again in September and October. Lamphere had told Ahlquist that Super Walmart was interested in the property, and Ahlquist wrote to see if there were any new developments. Lamphere responded that the property was too small for Super Walmart, but added this: "We're still negotiating with a company from Pennsylvania and most recently a buyer from Oroville who owns a large industrial park in Oroville and sees the value going up and wants to buy and hold. I will know in a few days where they stand. Otherwise, we will look at an early spring start if nobody comes through and we'll keep it ourselves. Great to hear from you. We'll talk soon."

In January of 2009, Ahlquist asked for another update as well as a schedule K-1 for the year 2008, and received this response: "We actually have a meeting this Wednesday with the Oroville group. They've been busy buying other projects. We've been negotiating off and on since September. They are serious buyers and I hope to work out a deal with them. K-1 will be out in a few weeks." Ahlquist later received a K-1 form for 2008, which again showed a beginning and ending capital account balance of $300,000.

In April, Lamphere wrote to Ahlquist: "We'll talk over the next couple weeks on PHSS, which is Pacific Heights Self-Storage. There are a few moving parts and great opportunities with this project."

On May 22, Ahlquist finally asked Lamphere for his money back. Lamphere told him that "for the normal person he wouldn't be able to do that because there was a development lead time of maybe 18 months, but for me he would return my money by

the end of the year." Ahlquist contacted Lamphere again in November, and was then told: "It's a remote possibility that you'll ever get your money back."

Ahlquist never recovered any of his money from Lamphere. He hired a lawyer and pursued a civil judgment, during the course of which he learned that the Oroville property had been sold.

PROCEDURAL BACKGROUND

On September 16, 2011, the Solano County District Attorney filed a felony complaint against Lamphere alleging grand theft, sale of unregistered securities, and sale of securities by means of a false statement, each count relating to the funds invested by Nicoli (Case No. FCR287577).

On May 29, 2012, the District Attorney filed an information in Case No. FCR287577 alleging grand theft only (Pen. Code § 487, subd. (a))[2] from Nicoli "[o]n or about and between April 2, 2007, and January 1, 2008." The information also alleged that the value of the property taken exceeded $200,000 (former § 12022.6, subd. (a)(2)).

While Case No. FCR287577 against Lamphere was pending, the District Attorney filed a second case against him relating to the funds invested by Ahlquist (Case No. FCR299119).[3] An amended complaint filed on April 17, 2013 charged Lamphere with two counts of grand theft, sale of an unregistered security, offering a security for sale using false statements, and sale of a security by use of a device, scheme, or artifice to defraud.

The trial court granted the prosecution's motion to consolidate the two cases on October 14, 2015. The prosecution then filed an amended information charging Lamphere with five counts: grand theft by false pretense of personal property (§ 487, subd. (a)) from Nicoli between April 2, 2007, and January 1, 2008 (count 1); grand theft

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[2] Further undesignated statutory references are to the Penal Code.

[3] The complaint in Case No. FCR299199 is not part of the record on appeal.

by embezzlement of personal property (§ 487, subd. (a)) from Ahlquist between November 17, 2006, and March 12, 2007 (count 2); sale of unregistered securities (Corp. Code §§ 25110, 25540, subd. (a)) between August 1, 2006, and November 17, 2006 (count 3); offering of a security for sale using false statements or omission of a material fact (Corp. Code §§ 25401, 25540, subd. (b)) between August 1, 2006, and November 17, 2006 (count 4); and sale of a security by willful and fraudulent use of a device, scheme, or artifice to defraud (Corp. Code § 25541) between August 1, 2006, and November 17, 2006 (count 5). It was further alleged with respect to each count that the value of the property taken exceeded $200,000 (former §12022.6, subd. (a)(2).)

Trial began on August 17, 2016 and lasted approximately two weeks.

The jury was unable to reach a verdict on count 1, but found Lamphere guilty on each of the remaining counts, and found true the allegation with respect to each of those counts that the value of the property taken exceeded $200,000.

The trial court sentenced Lamphere to three years in prison on count 5, imposed and stayed the two-year enhancement under former section 12022.6, subdivision (a)(2), and stayed imposition of sentence for the remaining counts under section 654. This appeal followed.

DISCUSSION

Lamphere argues that: (1) the trial court erred in permitting the prosecution to amend the end date alleged in the information on count 2; (2) the trial court erred in permitting the prosecution to amend the end date in the information on count 5; (3) the jury instructions regarding Corporations Code section 25541 were erroneous; (4) substantial evidence does not support the jury's verdict on count 3; (5) the prosecutor committed prejudicial misconduct during closing argument; and (6) the enhancements for taking property in excess of $200,000 in value must be set aside.

I. *The Trial Court Did Not Abuse Its Discretion In Permitting Amendment of the End Date on Count 2*

A. Additional Background

As noted, the amended information alleged in relevant part that Lamphere committed grand theft of Nicoli's property between April 2, 2007 and January 1, 2008 (count 1), and that Lamphere committed grand theft of Ahlquist's property between November 17, 2006, and March 12, 2007 (count 2). The information also alleged with respect to the March 12, 2007 date:

"During the course of District Attorney Investigator Ash's investigation he reviewed MR. LAMPHERE's West America Bank account records and discovered that between November 17, 2006 and March 12, 2007 MR. LAMPHERE spent $171,000 of MR. AHLQUIST's $300,000 on personal expenses including car payments and American Express Card payments. By March 12, 2007 MR. LAMPHERE had spent the entire $300,000 and his Lamphere Development account balance was negative $2,513."

At trial, investigative auditor Edward Hudson testified as an expert for the prosecution based on a review of Lamphere's bank records. Hudson testified that Lamphere spent Ahlquist's money between the time it was deposited on November 17, 2006 and March 12, 2007.

After the close of evidence and before closing arguments, the prosecution moved pursuant to section 1009 to amend the information to change the end date on count 2 from March, 12, 2007 to January 1, 2008.[4] The trial court granted the motion over defense counsel's objection:

"THE COURT: Well, look, I think all of this was covered in two different preliminary hearings. It's not like different charges are being added. And I just think it's an appropriate motion, based upon the evidence. So I'm going to overrule the

[4] The motion also sought to change the end dates on counts 3 and 4 from November, 17, 2006 to January 23, 2007, and on count 5 from November 17, 2006 to January 1, 2008.

objection and grant that motion to amend to conform to proof. I really don't see any prejudice."

B. Analysis

Lamphere argues that the trial court abused its discretion in permitting the amendment of the end date on count 2, and that the amendment: (1) violated his due process right to notice of the charges against him (see *In re Gault* (1967) 387 U.S. 1, 33–34); (2) violated his right to know the factual theory underlying count 2 (see *People v. Salvato* (1991) 234 Cal.App.3d 872, 878); and (3) charged an offense not shown by the evidence at the preliminary examination. We disagree.

Section 1009 provides, in relevant part: "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

"Section 1009 authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination. If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted. The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion. Moreover, a trial court correctly exercises its discretion by allowing an amendment of an information to properly state the offense at the conclusion of the trial. Similarly, where the amendment makes no substantial change in the offense charged and requires no additional preparation or evidence to meet the change, the denial

of a continuance is justified and proper." (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

The information provided notice to Lamphere of the charges against him, and the amendment did not obviate that notice by modifying the end date with respect to count 2. The information also provided very specific notice to Lamphere of the factual theory underlying count 2, describing Ahlquist's conversations with Lamphere from August through November of 2006, the prospectus provided to Ahlquist in November of 2006, Ahlquist's investment of $300,000 in the project, and Lamphere's assurances over the following months and years that the project was moving forward, until Lamphere ultimately told Ahlquist that the return of his money was a "remote possibility" in November of 2009. And as noted, with respect to the March 12, 2007 end date, the information alleged: "During the course of District Attorney Investigator Ash's investigation he reviewed MR. LAMPHERE's West America Bank account records and discovered that between November 17, 2006 and March 12, 2007 MR. LAMPHERE spent $171,000 of MR. AHLQUIST's $300,000 on personal expenses including car payments and American Express Card payments. By March 12, 2007 MR. LAMPHERE had spent the entire $300,000 and his Lamphere Development account balance was negative $2,513."

Nor did the amendment change the offenses to ones not shown by the evidence at the preliminary hearing. At both the preliminary hearing in Case No. FCR299119 and at trial, the prosecution's expert testified based on bank records that Ahlquist's money had been spent by March 12, 2007.[5]

Finally, Lamphere does not argue that the change in dates required any additional evidence or preparation from the defense. He did not dispute at trial that the testimony

[5] We granted the Attorney General's unopposed motion to augment the record with the transcript of the preliminary hearing in Case No. FCR299119.

and bank records showed that Ahlquist's funds were gone by March 12, 2007. Instead, his defense was based on his own testimony that he was entitled to a management fee and to reimburse himself in advance for future expenses from Ahlquist's money as the general manager of the LLC. And this was the argument Lamphere's counsel made to the jury during closing argument. Were all that not enough, Lamphere's brief on appeal concedes that after March 12, 2007, "there were no longer any . . . Ahlquist funds to embezzle." In sum, the information, the evidence at the preliminary hearing, and the evidence at trial all consistently alleged that Lamphere had spent Ahlquist's money by March 12, 2007. The amendment of the date in count 2 was, at best, superfluous.

In arguing that the amendment was improper, Lamphere repeatedly asserts that it somehow permitted the jury to convict him on count 2 based on his misuse of the funds invested by Nicoli. His brief asserts, for example, that the amendment meant that "Count 2 should reach the $1.22 million of Nicoli funds as well as the $300,000 investment of Ahlquist," that "the Nicoli funds were in whole or part embezzled from Ahlquist," and that prior to the amendment, he "had no need to prepare and present any defense as to any expenditure involving either (1) the Nicoli funds or (2) a date after March 12, 2007." But Lamphere was charged with grand theft of Nicoli's investment in a separate count, with separate supporting factual allegations, and therefore had to prepare a defense on that count with or without the amendment. Lamphere has not argued that the jury was incorrectly instructed regarding the elements of the offense of grand theft.[6] And as just discussed, the information and the evidence at trial indicated clearly that Ahlquist's money was gone by March 12, 2007. The trial court did not abuse its discretion in permitting the amendment.

[6] To convict on count 2, the jury was required to find that Ahlquist entrusted his property to the defendant, that he did so because he trusted the defendant, that the defendant fraudulently converted/used that property for his own benefit, and that when the defendant did so, he had intended to deprive the owner of its use.

II. *The Trial Court Did Not Abuse Its Discretion in Permitting Amendment of the Date on Count 5*

Corporations Code section 25541 provides criminal liability for "[a]ny person who willfully employs, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security or willfully engages, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, or sale of any security."

Count 5 alleged that Lamphere violated Corporations Code section 25541 "on or about and between the 1st day of August, 2006, and the 17th day of November, 2006." As discussed, November 17, 2006, was the date that Ahlquist invested his $300,000.

After the close of the evidence, as part of the motion discussed above in connection with count 2, the prosecution moved to amend the information to replace the November 17, 2006 date in count 5 with January 1, 2008, and the trial court permitted the amendment over defense counsel's objection.

Lamphere argues that he was prejudiced by this amendment because it permitted the jury to convict him based on conduct that took place in 2007, which could not have been directed at the 2006 sale, and because it permitted the jury to convict him based on conduct directed at Nicoli.

Again, and for similar reasons discussed above, Lamphere's argument fails. The amendment did not change the offense charged. Lamphere does not argue that the amendment relied on information not shown at the two preliminary hearings, and obviously he and his counsel were put on notice that the evidence from both preliminary hearings would be considered together when the two cases were consolidated. Lamphere argues it was improper for the jury to consider his 2007 conduct in connection with the sale of the security in 2006, but he does not argue that the jury was improperly instructed

as to any element of the offense or offer any authority that his 2007 conduct was irrelevant to the charge in count 5.

III. *The Jury Instructions on Count 5 Were Not Erroneous*

With respect to count 5, the trial court instructed the jury, over defense counsel's objection, that "[t]he finding of a criminal violation of Corporations Code Section 25541 does not require a finding that any particular investor actually knew of, or relied on, any false or misleading information disseminated by a defendant, either as part of a device, scheme, or artifice to defraud or as part of an act, practice, or course of business which operates, or would operate, as a fraud."

Lamphere argues that although this instruction was correct "in the abstract" and "facially correct," it was misleading in the factual context of this case because the alleged fraudulent scheme was targeted only at Ahlquist. But Lamphere does not explain why Corporations Code Section 25541 requires reliance when the fraud is targeted at only one investor, but not when it targets multiple investors. He cites no authority in support of his argument, and his brief does not even quote, much less offer any analysis of, the text of Corporations Code section 25541. Nothing in the language of that statute indicates that reliance by at least one investor is required, and the phrase "which operates *or would operate* as a fraud or deceit upon any person" suggests the opposite. (Corp. Code § 25541, subd. (a) (emphasis added); see *Swain v. Beard* (S.D. Cal. Dec. 19, 2013, No. 11-CV-1086-H PCL) 2013 WL 6795069, *28 ["There is nothing in the language of [Corporations Code section 25541] that suggests reliance is required"].)

But even assuming that the instruction was erroneous, which it was not, Lamphere has failed to show any resulting prejudice. Instead, he makes the confusing assertion in his opening brief—without citation to the record—that Ahlquist "testified that he was well aware of the purported misrepresentations knowingly made by Lamphere in offering the LLC security for sale, and further testified that those statements were material to his decision to buy the security, and, indeed, were relied upon by him in buying the

security." The fact is Ahlquist testified that various of Lamphere's representations were important to his decision to make his investment.

IV. *Substantial Evidence Supports the Verdict on Count 3*

A. Additional Background

Corporations Code section 25110 provides, in relevant part: "It is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified . . . or unless such security or transaction is exempted or not subject to qualification . . . ." Under Corporations Code section 25102, subdivision (f)(2), the transaction was exempt if "by reason of [Ahlquist's] business or financial experience . . . [he] could be reasonably assumed to have the capacity to protect [his] own interests in connection with the transaction." Lamphere had an affirmative defense on count 3 if he raised a reasonable doubt as to whether he knew, or was criminally negligent in failing to know, that the transaction was exempt by reason of Ahlquist's business or financial experience, and the jury was so instructed. (See *People v. Salas* (2006) 37 Cal.4th 967, 981–983.)

After the close of evidence, defense counsel moved for an acquittal on count 3 pursuant to section 1118.1[7], arguing that Lamphere had established such a reasonable doubt. The trial court denied the motion. And after the jury returned its verdict, Lamphere moved for a new trial on the same grounds. The trial court denied the motion, holding as follows:

"I think the jury's verdict was supported, there was evidence that supported it. Mr. Ahlquist had been a pilot for many decades, but he had zero experience in real estate.

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[7] Which provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

Zero. He did have a master's degree in operations management, but he didn't really even know what that was. He had no investing experience, other than managing his individual 401(k). He did subscribe to a personal finance magazine, but he had no education or classes regarding investing. He did not consult an adviser when considering this investment.

"Now, it is true that it's really from the defendant's perspective how the defendant perceived, but the Court instructed the jury on that, you know, reasonable good faith belief that the security was exempt and the jury rejected that. I can't say their conclusion was inappropriate.

"And we're talking about a testifying witness's mental state or knowledge. That's really something that's unique for the jury to decide, under most scenarios."

B. Analysis

In reaching their guilty verdict on count 3, the jury necessarily found that Lamphere had not raised a reasonable doubt that he knew, or was criminally negligent in failing to know, that the security was not exempt. Lamphere argues, however, that the evidence does not support that verdict.

"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Lamphere's brief cites some 15 facts regarding Ahlquist's business and financial experience in support of his argument, including that Ahlquist had a master's degree in operations management, subscribed to Kiplinger's personal finance magazine, managed his own 401(k), was 50 years old, had a net worth of over $500,000, and so on. But this argument ignores the "extremely deferential substantial evidence standard of review,"

under which "we must disregard the contrary evidence." (*Doe v. Regents of Univ. of California* (2016) 5 Cal.App.5th 1055, 1059; see *People v. Mendonsa* (1982) 137 Cal.App.3d 888, 891 ["When a jury's finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact . . . . It is of no consequence that the jury, believing other evidence or drawing other inferences, might have come to a contrary conclusion"].)

Viewing the whole record in the light most favorable to the judgment discloses, among other things, that Ahlquist had no experience in real estate development or investing, and his only experience in investing generally was choosing the allocation of funds and stocks in his 401(k). And other than his Kiplinger's subscription, he had taken no classes and had no other education about investing. Moreover, Ahlquist looked up to Lamphere and held him in a position of trust, testifying, for example, that it was a "given that [Lamphere] was my mentor," and that he "was very much in awe of [Lamphere]," to the point of writing to Lamphere that he wanted to "see and breathe the hallow [*sic*] ground of my mentor." All this is substantial evidence in support of the jury's conclusion that Lamphere did not have a reasonable good faith belief that Ahlquist had the capacity to protect his own interests in connection with the transaction.

V. *Lamphere Has Forfeited His Argument Regarding Alleged Prosecutorial Misconduct*

A. Additional Background

At the beginning of her closing argument, the prosecutor described Lamphere: "He's a sociopath. He doesn't care. He's diabolical. He's a smug, arrogant con man, and that's what he is." Defense counsel objected, and the trial court sustained the objection, telling the prosecutor to "[r]ein it in a bit," and instructing the jury to disregard the remarks.

Later, the prosecutor characterized the defense expert on securities, Gerald Niesar, as "a $20,000 hired gun," and Charles Hansen, the defense expert on real estate transactions, as "[t]heir other hired gun" who was "paid $600 an hour."
And the prosecutor several times made reference to Hansen and Niesar's compensation, for example: "This theft isn't complicated. The actual lying, tricking someone into giving you money and then stealing it. That's not that complicated, but this is wrapped up in what looks like this convoluted thing that only at $20,000 expert can explain to us and a $600 an hour real estate expert can explain to us. So I simplified it for us, because we're not as smart as those experts, apparently, and we might drive junky cars. And apparently we're not be very smart if we drive cars that aren't very nice, according to Mr. Niesar."

And still later on, the prosecutor discussed Niesar's testimony this way:

" . . . [Lamphere] managed nothing for six days and paid himself $50,000.

"Then he gets his hired gun up here, his securities defense attorney to tell you, yeah, you can do that, you can pay yourself in advance. Really? Because that's not what it says in the operating agreement.

"And his securities guy, who gets paid an astronomical amount of money to tell you what the defense wants to hear, and you don't have to believe that expert at all. That's up to you. He says, well, it's not in the operating agreement. Well, you know, Mr. Niesar, it's not what's not in the operating agreement, it's what's in the operating agreement that Mr. Ahlquist relied on. And there's nothing in there that says reasonable compensation to be paid one year in advance.

"And then I said: How about this extra money? The extra stuff that went into your other account, your American Express?

"Do you know what he said? Those are reimbursables in the future for expenses I haven't paid, but I'm reimbursing myself for those. Now, that is crazy. That's insane. And that's a theft.

"And he has, again, Mr. Niesar, who I finally had to ask: How much are you getting paid, sir? Because this testimony coming out of his mouth is incredible. That's why it was the last question I asked. Something is really wrong here. I said: Mr. Niesar, he seemed like a pretty nice guy, very smart. And I said: How much?

"He said: $650 an hour.

"That explained everything. That's what you get if you violate the securities law. That's the kind of attorney you want to call, because he'll say if it's not in the operating agreement, it doesn't say you can't. Well, you know what, a reimbursement is a reimbursement. It means you pay for something and you reimburse yourself for something. You read that operating agreement, and it says upon substantiation, upon, meaning expense, then you get paid. That's the way it works.

"And Mr. Niesar can come up and spout anything he wants. That's the truth."

Later, the prosecutor made the following remarks with respect to Hansen:

"Now, $600-an-hour Charles Hansen came and was hired by the defense. And why? Because you and me and everyone in this courtroom can't understand real estate law. It's so complicated they need an expert to tell us how to read a real estate contract and how to read the escrow documents."

The prosecutor also argued that Lamphere committed the theft in "the worst kind of way" because he "took advantage of two kind, hard-working people," later noting that Ahlquist's investment was his "entire retirement fund. The money he's going to use to retire; the money he's going to use for his family; the money that's going to allow him to enjoy life . . . ." The prosecutor also described Nicoli as "a decent man" who was "good as gold."

B. Analysis

Lamphere argues that the prosecutor's remarks about his experts' compensation amounted to prejudicial misconduct. However, "[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if

an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.) Lamphere acknowledges this requirement, but argues that an objection would have been futile because after defense counsel objected to the prosecutor's description of Lamphere as a "sociopath" and "diabolical," the prosecutor "quickly resumed her pattern of misconduct, demonizing the defense experts and appealing to the jury's passion in referencing the alleged victims." But the focus of the requirement is not what the prosecutor would have done: " 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' (*People v. Williams* (1997) 16 Cal.4th 153, 254.)" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) And "nothing in the present record suggests a timely objection or a request for an admonition would have been futile, that an admonition would not have cured any harm, that defendant did not have the opportunity to raise the necessary objection or to make a request for an admonition, or that a timely objection would have been counterproductive to defendant," nor does Lamphere offer any argument to that effect. (*People v. McDowell* (2012) 54 Cal.4th 395, 436, citing *People v. Hill* (1998) 17 Cal.4th 800, 820–821).) Lamphere's claim of prosecutorial misconduct has been forfeited.

VI. *The Enhancement for a Loss Greater than $200,000 Is Supported By Substantial Evidence*

A. Additional Background

As noted, the information alleged, with respect to all five counts that the value of the property taken exceeded $200,000 (former § 12022.6, subd. (a)(2)). The jury was instructed on this enhancement as follows:

"If you find the defendant guilty of one or more of the crimes charged, you must then decide whether the People have proved the additional allegation that the value of the property taken was more than $200,000. [¶] To prove this allegation, the People must

prove that: [¶] 1. In the commission of the crime, the defendant took property; [¶] 2. When the defendant acted, he intended to take the property; [¶] AND [¶] 3. The loss caused by the defendant's taking the property was greater than $200,000.

"If you find the defendant guilty of more than one crime, you may add together the loss suffered by each victim in Counts 1 through 5 to determine whether the total losses to all the victims were more than $200,000 if the People prove that: A. The defendant intended to and did take property in each crime; [¶] AND [¶] B. The losses arose from a common scheme or plan.

"When computing the amount of loss according to this instruction, do not count any taking, damage or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim."

The jury found the allegation true with respect to each of counts 2 through 5.

B. Analysis

Former section 12022.6, subdivision (a), in effect through trial, provided: "When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] . . . [¶] (2) If the loss exceeds two hundred thousand dollars ($200,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years."

Lamphere argues that this enhancement must be set aside for two reasons: (1) the instruction that "you may add together the loss suffered by each victim in Counts 1 through 5" permitted the jury to rely on the funds taken from Nicoli even though they did not reach a verdict on count 1[8]; and (2) the prosecution admitted that Lamphere spent

[8] Defense counsel responded "No" when asked by the trial court whether he had any objection to this instruction, and thus this argument would ordinarily be waived by

some $123,000 of Ahlquist's money paying the mortgage on the Oroville property and thus could only have embezzled less than $200,000 of Ahlquist's $300,000 investment.

"When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 803–804.) We find no reasonable likelihood that the jury misapplied the instruction here by considering the funds invested by Nicoli in applying the enhancement even though they did not reach a verdict on count 1. The enhancement was alleged separately as to each count, and found true separately by the jury with respect to each of counts 2 through 5 on the verdict form. The natural reading of the instruction was that the losses should be added together only for the counts on which the jury had found Lamphere guilty. Thus the instruction began: "*If* you find the defendant guilty of one or more of the crimes charged, you must *then* decide whether the People have proved the additional allegation that the value of the property taken was more than $200,000," going on to describe the first element, that "*[i]n the commission of the crime,* the defendant took property," the reference being logically read as to the crime of which the defendant had been found guilty. The third paragraph then explained that the amount of loss could be aggregated across the various counts, as long there was no double counting of the same loss to the same victim. Reading all this in context, we think the instructions made clear that the loss should be aggregated only for crimes or counts on which the jury had found the defendant guilty. Accordingly, we conclude there was no reasonable

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failure to object. However, because instructions that result in the imposition of a sentencing enhancement without statutory authority, as Lamphere argues here, would clearly affect his substantial rights, we will reach the merits. (See § 1259 [appellate court may review instructions not objected to in trial court if they affect defendant's substantial rights].)

likelihood that the jury included the funds alleged to have been taken in count 1 in finding the enhancement allegation true.

Lamphere's second argument challenges the jury's true finding on the enhancement, a finding we review for substantial evidence. (See *People v. Denman* (2013) 218 Cal.App.4th 800, 810.) The argument is based on the testimony of the prosecution's expert, in turn based on bank records, that Lamphere made $123,000 in payments to Robinson toward the mortgage on the Oroville property using Ahlquist's funds between November 2006 and February 2007, and the prosecutor's comment during closing argument that these payments were "about the only legitimate thing that happened." The argument fails, for three reasons.

First, the jury was free to disregard the evidence of the mortgage payments entirely, and in our review for substantial evidence in support of the enhancement, we must do so. (See *Doe v. Regents of Univ. of California, supra,* 5 Cal.App.5th at p. 1059 ["Under the extremely deferential substantial evidence standard of review, we must disregard the contrary evidence . . ."]; *People v. Mendonsa*, *supra*, 137 Cal.App.3d at p. 891.)

Second, while Lamphere's use of Ahlquist's money to pay the mortgage on the Oroville property may have been "legitimate" in the sense that it was related to the project or permitted by the LLC operating agreement, application of the enhancement depended on whether Lamphere intended to take Ahlquist's property, and whether the "loss" caused by that taking was greater than $200,000. While the mortgage payments may have suggested that Lamphere lacked the requisite intent, they certainly did not compel that conclusion—and the jury was free to conclude otherwise. As for the loss, whether Lamphere paid the mortgage or not, it was undisputed that the property was ultimately sold without Ahlquist's knowledge—and that Ahlquist lost his entire $300,000 investment.

Third, in applying the enhancement, "the emphasis is on what the victim lost, not what the defendant gained." (*People v. Beaver* (2010) 186 Cal.App.4th 107, 118; *People v. Frederick* (2006) 142 Cal.App.4th 400, 421–422 [enhancement proper where defendant "exercise[d] dominion and control over the funds" notwithstanding telephone calling cards provided in exchange]; *People v. Denman, supra*, 218 Cal.App.4th at p. 812 [where defendant placed cloud on title to property, each victim "suffered a total loss that equaled the assessed value of the property" even though most were later able to clear title and sell the properties]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539.) Thus, even if Lamphere's use of some of the money had redounded to Ahlquist's benefit, the jury was nevertheless free to include those amounts in measuring Ahlquist's loss. Substantial evidence supports the jury's true finding on the enhancement allegations.

DISPOSITION

The judgment is affirmed.

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Richman, Acting P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

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